

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

LOIS P. SNYDER
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-59
Case No. 69-1082

S.S.A. No. - - - -

NORTH AMERICAN ROCKWELL CORPORATION
AEROSPACE AND SYSTEMS GROUP
(Employer) - - - -

Employer Account No.

The employer appealed from Referee's Decision No. BK-17471 which held that the claimant was no longer disqualified for benefits under section 1256 of the Unemployment Insurance Code on the ground that she had satisfied the period of ineligibility provided by section 1260(a) of the code. Written argument was submitted by the claimant and the employer.

STATEMENT OF FACTS

The claimant was employed by the employer-appellant for seven years; her last assignment was as a production control clerk at the wage of \$3.28 per hour and the employment was terminated on January 10, 1968 when the claimant chose to be laid off instead of accepting a transfer to the position of stock clerk. She filed her claim for unemployment benefits effective January 14, 1968.

The claimant had been previously associated with a cosmetics firm as a sales representative in 1960. After becoming unemployed she again contacted this cosmetics

manufacturer and sought to resume the association. On January 19, 1968 she signed a contract with the company and again became a sales representative. She continued in this relationship until June 2, 1968 when she left on her physician's advice because she was developing an allergy from the cosmetics.

Under the written contract as a sales representative, the claimant was assigned an exclusive territory in Canoga Park. The company obligated itself to pay a "commission of 40% of customer prices on all orders aggregating \$75 or more and 25% of customer prices on all orders totalling less than \$75," and to pay all transportation charges on goods shipped to the sales representative. It also reserved the right to modify the commission and the transportation charges upon appropriate notice to the sales representative. The sales representative obligated herself to make regular sales trips, to solicit and take orders, to deliver the goods to "ultimate consumers only," and to remit to the company the amount due for each shipment. All orders secured by the sales representative were subject to the company's approval, and there was no authority vested in the representative "to incur any debt, obligation or liability or to make any representation or contract on behalf of the Company." The contract concluded with the following:

"This is the sole and only Agreement between the parties and does not constitute the Sales Representative an employee of the Company."

The cosmetic manufacturing company's sales department manager testified that each sales representative is given an exclusive territory consisting of approximately 300 homes to service; that the company furnishes a "beauty showcase" to each without charge; that all order forms and promotional literature are furnished; that the sales representative does not have set hours of work; that the company does not know what the representatives charge the ultimate consumers for its products, although the company does suggest a retail price list for its merchandise; that no leads are furnished the representatives and no lists of

customers are given; that no written reports are required; that the company pays the sales tax on its products, although the sales representative is asked to charge the tax to the consumer and to remit it to the company; that sales representatives are not given an expense account nor are they reimbursed for travel expenses; that the company holds sales meetings once per month which sales representatives are urged, but not required, to attend; that they may sell other cosmetic products; and that the company reserves the right to remove a sales representative if sales are made to commercial establishments. No business cards are furnished. Sales representatives work under a district manager who is the company's employee. They are responsible for sales in their areas. They are furnished with a listing of the total net value of the merchandise sold by sales representatives in their respective areas. They may call upon their sales representatives to assist them in their "earning opportunity," but have no right to direct their efforts; they may make suggestions to the sales representative but cannot demand compliance.

The claimant testified that her "supervisor" (manager) sent her postal cards about "twice per month" expecting her presence at designated "meetings" during the course of which the claimant was "explained how to sell, how to demonstrate the products" and what "they expect from you as a representative." She understood that attendance was compulsory and knows of one associate whom the manager "terminated" because she missed two such meetings. From the conversations with her manager the claimant understood she was expected to spend at least three hours per day in the field in sales solicitation. She was told to keep a "file of customers" and to show this file to her manager who would review the sales and "if this customer wasn't ordering what she was before, she tells me what to do, to go back and call on them." The "supervisor" did not accompany the claimant in her field contacts.

The Department had reviewed the operations of the cosmetic manufacturer's sales representatives on two occasions in the past and had issued two

ruling letters. The last one is dated December 7, 1948 confirming a ruling dated April 15, 1941, holding the sales representatives to be independent contractors.

REASONS FOR DECISION

The referee in his decision made the assumption, without deciding, that the claimant was an independent contractor, and that it was bona fide employment under section 1260(a) of the code, and since the claimant had earned in excess of five times her weekly benefit amount she was not ineligible for benefits after June 2, 1968.

We find that the services performed by the claimant as a salesperson were performed as an independent contractor and not as an employee. In this respect we are in agreement with the rulings of the Department. The cardinal principle, as spelled out in Empire Star Mines Company, Ltd. v. California Employment Commission (1946), 28 Cal. 2d 33, 168 P. 2d 686, of the right to control the manner and means of accomplishing the result desired, is not indicated.

We pass next to the consideration of section 1260(a) of the Unemployment Insurance Code:

"1260. (a) An individual disqualified under Section 1256, under a determination transmitted to him by the department, is ineligible to receive unemployment compensation benefits for the week in which the act that causes his disqualification occurs and continuing until he has, subsequent to the act that causes disqualification and his registration for work, performed service in bona fide employment for which remuneration is received equal to or in excess of five (5) times his weekly benefit amount."

In Benefit Decision No. 6593 the board held that a period of ineligibility assessed under section 1264 of the code was terminated after the claimant had earnings as an independent contractor in at least one week in

excess of her weekly benefit amount. In so doing, the board relied on language in section 1252 of the code to find that the earnings received as an independent contractor interrupted "an ensuing period of unemployment" under section 1252 of the code and constituted employment under section 1264 of the code. We do not agree. Section 1252 of the code provides:

"1252. An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount. Authorized regulations shall be prescribed making such distinctions as may be necessary in the procedures applicable to unemployed individuals as to total unemployment, part-total employment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work. For the purpose of this section only the term 'wages' includes any and all compensation for personal services whether performed as an employee or as an independent contractor." (Emphasis added)

In our opinion the holding in Benefit Decision No. 6593 was an improper construction of the last sentence of section 1252. The limitation expressed in said sentence requires that for that section only the earnings of an independent contractor are considered wages.

The cardinal rule in the construction of statutes is to follow the legislative intent and that intent must be determined from the express language of the statute so far as possible. Where the meaning of the language of the statute is free from ambiguity, the intention of the legislature must be determined from that language, and it cannot be rewritten through interpretation to conform to a presumed intention which is not expressed, however desirable such a result might appear to be and even though the consequences of applying the express language would be to defeat the object of the statute. (Seaboard Acc. Corp. v. Shay (1931), 214 Cal. 361, 5 P.

2d 882; Department of Motor Vehicles v. Industrial Accident Commission (1948), 83 Cal. App. 2d 671, 189 P. 2d 730; Benefit Decision No. 6798)

Black's Legal Dictionary, page 1292, defines "only" as follows:

"ONLY. Solely; alone; of or by itself; without anything more; exclusive; nothing else or more. Moore v. Stevens, 90 Fla. 879, 106 So. 901, 904, 43 A.L.R. 1127; Foley v. Ivey, 193 N.C. 453, 137 S. E. 418; City of Memphis, Tenn., v. Board of Directors of St. Francis Levee Dist. (D. C.) 228 F. 802, 804; Bacon v. Federal Reserve Bank of San Francisco (D. C.) 289 F. 513, 519."

The limitation is borne out by the purposes of section 1252 (and its companion section 1279) which place self-employed and employed individuals eligible for benefits on the same basis with respect to earnings. If not, an individual otherwise eligible for benefits would be entitled to work as an independent contractor and remain eligible for benefits while another who accepted employment would be required to report all wages and either be ineligible for benefits under section 1252 or entitled to a diminished weekly benefit amount under section 1279, depending upon the amount of his wages.

As we construe section 1264 of the code, an individual who terminates employment for one of the various reasons specified in the section has temporarily withdrawn from a or the labor market, as the case may be, and the requirement that subsequent bona fide employment be obtained is to establish a reattachment to a labor market. (Benefit Decision No. 6798)

In Benefit Decision No. 6775, in order to establish some guidelines to determine whether or not there was a genuine return to the labor market, the board stated:

"In determining whether subsequent employment indicates a return to the labor market, we reiterate our statement in Benefit Decision No. 6129 that no definite standards or criteria can be established which may be applied uniformly in every case. We do not believe that such employment must necessarily be permanent and full time. However, consideration should be given, among other things, to the character of the employment, how it was obtained, the wage paid, whether it was in the regular course of the employer's business and the customary occupation of the claimant, the wage last received by the claimant in his customary occupation, and whether the claimant is willing to accept future employment of the same kind and under the same conditions. Evaluation of these factors will tend to show the good faith of the claimant in accepting the employment and will assist the trier of the facts in determining whether there has been a genuine return to the labor market."

In Benefit Decision No. 6798, the board construed for the first time the meaning of bona fide employment in section 1260(a) and held that it was to be given the same meaning as in section 1264, citing 45 Cal. Jur. 2d, Statutes, section 21. (See also Crawford on Statutory Construction, P. 431 ff.)

In Benefit Decision No. 6808, the board held that a period of ineligibility under section 1260(a) could be satisfied by earnings from self-employment. We do not agree. We pointed out above that the last sentence of section 1252 was limited to the purposes of that section only. Benefit Decision No. 6593 rests on the broader construction given to it and Benefit Decision No. 6593 is the foundation for the prior board's decision in Benefit Decision No. 6808.

Furthermore, Benefit Decision No. 6593 was concerned with section 1264 of the code, and there is the implication that an individual held ineligible for benefits

under section 1264 has temporarily withdrawn from a or the labor market, as the case may be, and in order to again become eligible for benefits must show a reattachment to the labor market. On the other hand, there is no such implication in section 1256 which provides a disqualification for those claimants whose unemployment is the result of fault on their part (section 100, Unemployment Insurance Code); that is, those who left their work voluntarily without good cause or those who have been discharged for misconduct connected with their most recent work. In short, section 1256 provides the disqualification and section 1260(a) establishes the amount to be assessed.

In the case presently before us, we hold that the claimant was engaged in self-employment and her earnings may not be used to satisfy the provisions of section 1260(a). She remains ineligible for benefits after January 8, 1968 until the section is satisfied by bona fide employment.

DECISION

The decision of the referee is reversed. The claimant has not satisfied the period of ineligibility under section 1260(a) of the code.

Sacramento, California, December 2, 1969

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

We do not disagree with the finding reached by our colleagues that the claimant in this case was engaged as an independent contractor during the period she was a sales representative for the cosmetic firm. We part company with them, however, when they conclude that, for that reason alone, the earnings for services performed in that capacity cannot be used to satisfy the requirements of section 1260(a) of the code.

In Benefit Decision No. 6593 this board held that earnings as an independent contractor could be used to terminate a period of ineligibility under section 1264 of the code. In so doing it was decided that the term "employment" can include services performed in self-employment.

That decision was issued November 13, 1959 and we have adhered to its principles consistently up until the present case. In Benefit Decision No. 6798 we held that the term "employment" as used in section 1260(a) of the code has the same meaning as in section 1264. In Benefit Decision No. 6808 we specifically held that earnings in self-employment were in "bona fide employment" and satisfied a disqualification previously imposed under section 1256 of the code.

As recently as April 5, 1968 we recognized that earnings from self-employment could satisfy that requirement. In Appeals Board Decision No. P-B-5, issued on that date, we found, under the facts of that case, that self-employment was not bona fide so as to satisfy a disqualification under section 1256. We were careful to point out, however, that self-employment under different circumstances could serve that requirement. There we said:

"We do not intend to imply that self-employment may never be construed as bona fide employment. Each case must be decided on the particular facts of that case and it is entirely conceivable that in some situations self-employment would, in fact, show

return to the labor market and therefore would be bona fide employment within the meaning of section 1260(a) of the code."

In our view, the reasoning in these cases is sound. Additionally, it is not without significance that although this board's interpretation of the phrase "employment" was made some ten years ago, it has not been challenged in the courts. Further, although the sections involved have been frequently examined by the legislature since that time, it has not seen fit to amend the sections so as to reach a different result.

It is a maxim of jurisprudence that "contemporaneous exposition is in general the best" and this maxim is codified in California. (California Civil Code, section 3535) The courts of California have recognized that long continued administrative construction of a statute by the officials charged with its administration must be given great weight, particularly when the conclusion reached has been sanctioned by long acquiescence on the part of the legislature and the courts (DiGiorgio Fruit Corporation v. Department of Employment (1961), 56 C. 2d 54; 13 Cal. Rptr. 663; 362 P. 2d 487; Lord v. Dunster (1889), 21 P. 865, 79 C. 447; In re Barr's Estate (1951), 231 P. 2d 876, 104 C. A. 2d 506) Consistency and continuity in administrative construction is evidence of its correctness. (15 Ops. Cal. Atty. Gen. 281) When the administrative interpretation is of long standing and has remained uniform, it is likely there has been reliance on it and it should not be overturned unless it is clearly erroneous. (Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944), 24 C. 2d 753 and cases cited therein)

Applying the above principles to the present case, we see no reason at this late date to overturn what heretofore has been a well-established and time-tested interpretation of the statutory phrase "employment" contained in section 1260(a) of the code.

Further, in the present case we would find that under the criteria set forth in Benefit Decision No. 6775 that the claimant here, during the time she worked as a cosmetic sales representative, was in "bona fide" employment and has thus, under section 1260(a) of the code, satisfied the prior disqualification imposed under section 1256 of the code.

LOWELL NELSON

DON BLEWETT